

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42986
Docket No. MW-43921
18-3-NRAB-00003-160732**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (former Burlington Northern
Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Foreman R. Miller by letter dated July 10, 2015 for alleged violation of MWOR 1.6 Conduct in connection with his alleged unapproved absence on Friday, June 5, 2015 and falsification of time was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-4738-M/11-15-0481 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Miller shall be immediately returned to service paid for his lost time while withheld from service and day to attend investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay, and we also request that Mr. Miller be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on July 13, 2015.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant has established and holds seniority within the Carrier's Maintenance of Way Department with approximately 38 years of service. At all times relevant to this case, the Claimant was assigned as a Foreman.

The Claimant was dismissed based on an incident that occurred on June 5, 2015. On that day, the Claimant was scheduled to work from 700 hours to 1500 hours. Following a conference call at 730 hours with his Roadmaster, the Claimant proceeded to the location where his crew was to begin operating a regulator. After a couple of hours on the job, the Claimant determined that it would not be possible to do any additional work because trains were occupying the track where they were to be working. The regulator was secured on the Carrier's back track, and the Claimant drove his Carrier vehicle back to their assigned headquarters. Following his arrival there, the Claimant decided that it was not possible to do any additional work that shift. At about 1220 hours, the Claimant left for home. Shortly after that, the Claimant's Roadmaster came to the headquarters and observed the location of the Claimant's vehicle, but he did not see the Claimant. The Claimant reported to the Carrier that he worked from 0700 hours to 1500 hours that day.

On June 8, 2015, the Carrier notified the Claimant that he was being removed from service pending an Investigation into allegations that he had an unapproved absence and falsified his time for June 5, 2015. An Investigation was conducted into these allegations on June 15, 2015, after which the Carrier determined that the Claimant had falsified his time. On July 10, 2015, the Claimant was dismissed for violating Maintenance of Way Operating Rule ("MWOR") 1.6 Conduct.

In discipline cases, the Carrier has the burden to prove that there is substantial evidence that the Claimant engaged in the alleged misconduct. The

Claimant was alleged to have violated MWOR 1.6 Conduct, which states that employees must not be "Dishonest."

There does not appear to be any dispute that the Claimant falsified his time records for June 5, 2015. During the investigation, the Claimant admitted that he worked roughly 5 hours that day, and that he put in for 8 hours pay, without contacting his supervisor for permission. It is well-established that when an employee admits guilt, there is no need for further proof. See Third Division Award 28484; Fourth Division Award 4779. Thus, the Carrier has proven by substantial evidence that the Claimant engaged in the charged misconduct.

The Organization does not dispute that the Claimant incorrectly entered his time, but it argues that the Roadmaster entrapped the Claimant, and that the Conducting Officer was biased. The Organization also argues that the discipline imposed on the Claimant was arbitrary, excessive and unwarranted. As a remedy, the Organization seeks to have the Claimant reinstated, with back pay and benefits, and to have his record cleared of any reference to this dismissal.

The Organization's argument that the Roadmaster entrapped the Claimant is based on its contention that the Roadmaster could have simply called the Claimant or a member of the Claimant's crew once the Roadmaster found the regulator secured and the Claimant's vehicle parked. Instead, the Roadmaster placed a quarter on the tire of the Claimant's vehicle. The Roadmaster checked later that evening and found the quarter was still there, which reinforced his suspicion that the Claimant had not worked during that time. This argument attempts to excuse the Claimant's misconduct on the basis of a particular supervisory method. It is certainly possible that the Roadmaster could have simply called the Claimant to check on the status of the Claimant and his crew, and perhaps that would have been a better way to address the issue, but the Roadmaster is under no contractual obligation to use this method. In this work environment, where employees are often spread out over miles, they all have a duty to report honestly. If supervisors decide that they want to check up on the honesty of their subordinates in the manner that occurred here, it is not for the Board to determine that this method is inappropriate.

The Organization also argues that the Conducting Officer was biased. Specifically, the Organization alleges that taking the Claimant out of service was unnecessary and shows prejudgment, and that the Conducting Officer asked

leading questions, improperly offered direct testimony, and failed or refused to address objections raised by the Claimant's representatives.

The obligation to provide a fair and impartial Investigation, and the conditions under which an accused employee may be taken out of service, are addressed in Rule 40. Rule 40 states, in relevant part:

"A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule.

B. In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from service. He will be notified at the time removed from service of the reason therefor."

As to the Organization's contention that it was improper to take the Claimant out of service, Rule 40B authorizes such action in cases involving "serious infraction of rules." The Carrier has promulgated a set of disciplinary violations, which are categorized by degree of severity as (1) standard; (2) serious; and (3) stand alone dismissible. The allegation of falsification of time is a form of "dishonesty," which is included in the most serious category – stand alone dismissible. As such, the allegation against Claimant involved a serious infraction of the rules, and Claimant was properly removed from service.

The Board has carefully reviewed the record of the Investigation to assess the Organization's contention that that the Conducting Officer asked leading questions, improperly offered direct testimony, and failed or refused to address objections raised by the Claimant's representatives. To begin, there is nothing improper about a Conducting Officer asking leading questions. There may be times when questioning a reluctant witness that leading questions may be the best way to get useful information. The questions asked of the Claimant in his

Investigation were not out of the ordinary, and there is no indication that he was coerced or put under duress. There were only a handful of objections as it concerned Claimant, and all of them were addressed by the Conducting Officer. Concerning the issue of the Conducting Officer providing direct testimony, the Organization does not identify that testimony, and the record does not reveal any improper conduct of the Conducting Officer during the proceedings involving Claimant. In sum, the Organization has not shown that the Claimant was prejudiced by the manner in which the investigation was conducted.

Finally, there is the issue of whether the Claimant's dismissal was arbitrary, unwarranted, and excessive. The Carrier has proven by substantial evidence that the Claimant committed the stand alone dismissible violation of dishonesty by falsifying time records. That is a serious matter that breaches basic obligations in the employment relationship, so it cannot reasonably be concluded that his dismissal was arbitrary or unwarranted. However, discharge is a severe disciplinary penalty, so it is necessary to review whether it is excessive. In undergoing that analysis, it is appropriate to consider the employee's work record.

Employees with a long history of meritorious service are often given favorable consideration in assessing the reasonableness of a disciplinary penalty. In this case, the Claimant had been employed about 38 years at the time of the incident. That is a substantial period of service and merits consideration, depending on the Claimant's work record. The record shows that the Claimant would go beyond the requirements of the job to prepare for work. On the other hand, he has had four Level S suspensions, including three within the last five years of his employment. The most recent of these, which occurred just over one year prior to his dismissal, was a 30-day record suspension and a 36-month review period. Overall, the evidence of the Claimant's work record does not serve to mitigate against the discipline imposed by the Carrier. Under these circumstances, the Claimant's dismissal was not excessive.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of February 2018.